Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	Second Further Notice
Implementation of the Local	)	of Proposed Rule Making
Competition Provisions of the	)	CC Docket No. 96-98
Telecommunications Act of 1996	)	

COMMENTS OF PILGRIM TELEPHONE, INC.

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Executive Summary

Pilgrim is an interstate interexchange carrier which provides casual access, common carrier services. Pilgrim renders bills to its customers primarily through the customer's local exchange carriers ("LEC") bills, and to a limited degree engages in some direct billing to its customers. Pilgrim relies extensively on the embedded networks of the incumbent LEC and traditional facilities based interexchange carriers ("IXC"). By these comments, Pilgrim asks that the FCC include unfettered real time access to customer databases, billed name and address, blocking information and billing and collection services as unbundled network elements ("UNE") to be made available to service providers such as Pilgrim.

In order to determine whether it should include any network element as a UNE, the Commission must evaluate, first, whether the network element is proprietary in nature. If the network element is proprietary, in order to be included as a UNE, it must be necessary to the service provider's operations. If the network element is not proprietary, then its absence need only impair the service provider's operations. The threshold question is whether a network element is proprietary.

In considering whether a network element is proprietary, the FCC must consider both whether any party has proprietorship in the network element and, if so, who that proprietor is. In evaluating billing and collection information, it is clear that, to the extent the information is proprietary, it is proprietary to the billed customer, not the incumbent LEC. Without question, then, billing information cannot be said to be proprietary to the incumbent LEC.

Since billing and collection services are not proprietary and billing information, itself, is not proprietary to the LEC, Pilgrim need only make a showing that the lack of billing information impairs its ability to provide its services. Nonetheless, Pilgrim will demonstrate that billing and collection services and accurate billing information are essential -- necessary -- to its competitive operations.

All interconnectors, interexchange carriers ("IXCs"), commercial mobile radio service ("CMRS") providers and competitive LECs, need billing and collection services and access to accurate billing information, including line information data base ("LIDB"), as they originate calls which may be reverse billed to the called party on the terminating network. Additionally, communications service providers need access to billing information as they initiate casual access calls, so that accurate billing information may be used for verification purposes.

The necessity of billing and collection services and billing information to the completion and compensation of reverse billed calls compels the conclusion that billing and collection services and billing information are UNEs.

Pilgrim asks that the FCC include unfettered real time access to customer databases, billed name and address, blocking information and billing and collection services as UNEs to be made generally available to service providers.

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COMMENTS OF PILGRIM TELEPHONE, INC.

Pilgrim Telephone, Inc. ("Pilgrim"), by counsel, and pursuant to the Second Further Notice of Proposed Rule Making, released by the Federal Communications Commission ("FCC") on April 16, 1999,[1] hereby submits its comments on the FCC's proposal.

I. INTRODUCTION

Pilgrim is an interstate interexchange carrier which provides casual access, common carrier services.[2] The most common of these services are collect calling services. Pilgrim also provides several information and enhanced services, and occasionally offers pay-per-call

[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, Second Further Notice of Proposed Rule Making, FCC 99-70, released April 16, 1999.

[2] Pilgrim currently provides presubscribed 1+ services only in the eastern LATA of Massachusetts.

services.[3] Among the information and enhanced services it provides are access to group access bridging ("GAB"), telemessaging and voice mail services, bulletin board services and access to bulletin board services.[4] Pilgrim renders bills to customers primarily through its customer's local exchange carriers ("LEC") bills, and to a limited degree engages in some direct billing to its customers. Pilgrim relies extensively on the embedded networks of the incumbent LEC and traditional facilities-based interexchange carriers ("IXC").

Pilgrim provides its common carrier services pursuant to tariffs on file with the FCC and various state commissions. Pilgrim has participated extensively in proceedings before the FCC in a wide variety of billing, competitive services and service provisioning rule making proceedings. Pilgrim, like all service providers providing casual access telecommunications and electronic services to the public via the telephone, is dependent upon the essential facility of LEC billing, and is otherwise reliant on embedded LEC databases which exist primarily to permit the routing, completion, verification and billing and collection for telecommunications traffic.[5] Pilgrim and other providers of competitive casual access communication services, access to enhanced services and provision of enhanced services will be directly impacted by the rules and policies adopted by the FCC in this proceeding. Pilgrim, by these comments, asks that the FCC include unfettered real time access to customer databases, billed name and address, blocking

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[3] Pay-per-call services are provided pursuant to Section 228 of the Act, 47 U.S.C. § 228, and Sections 64.1501-64.1512 of the FCC's rules, 47 C.F.R. § § 64.1501-64.1512.

[4] Pilgrim notes that information and telemessaging services are subsets of enhanced services as defined by the FCC.

[5] Telecommunications traffic includes traditional message telecommunications service ("MTS"), common carrier services, access to common carrier and information services, and enhanced services.

information and billing and collection services as unbundled network elements ("UNE") to be made available to service providers such as Pilgrim.

II. BACKGROUND

In 1996 Congress amended the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.* by enacting the Telecommunications Act of 1996.[6] In enacting the 1996 Act, Congress intended to implement, and directed the Commission to execute policies which, *inter alia*, would promote and enhance the delivery of new technologies and services to the public, enhance and promote competition among service providers in the provision of those services and provide a structural mechanism for increased competitiveness. As an essential element of the third objective, promoting competition Congress enacted a complex set of regulatory and legislative requirements which provided a methodology for the Bell Operating Companies ("BOC") to obtain relief from the restrictions of the modified final judgment ("MFJ")[7] in exchange for unbundled and open access to the BOC's operation support systems ("OSS") and UNEs.

The principal directive regarding the unbundling of access elements is contained in Section 251(d)(2) of the Act.[8] As the Commission notes, Section 251(d)(2) establishes two tests by which to assess whether a network element should be unbundled. If the network element is proprietary to the LEC it must be necessary. If the element is not proprietary to the LEC, then its absence need only impair the competitor's ability to provide service. The "necessary and impair"

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[6] Public Law No. 104-104, 110 Stat 56.

[7] *United States v. American Tel. & Tel. Co.*, 552 F. Sup. 131 (D.D.C. 1982), *aff'd sub nom, Maryland v. United States*, 460 U.S. 1001, 103 S. Ct. 1240, 75 L. Ed. 2d 472 (1983).

standard, however, is only a floor, or a minimum, for the assessment of access elements which must be provided to competitor's by the LECs, including the BOCs. Congress empowered the Commission to determine that access to more network elements if access would promote the public interest.

On August 8, 1996, the FCC released the First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd (1996) ("First Report and Order"). In the First Report and Order, the FCC found that seven network elements were unbundled network elements ("UNEs"). On January 25, 1999, the Supreme Court[9]ordered the FCC to reconsider its decision and specifically consider the necessary and impair standards, set by Congress, in determining which network elements would be considered UNEs. In response to the Supreme Court's mandate, the FCC initiated the instant proceeding.

Congress recognized that competitors which are entitled to unfettered and non-discriminatory access to network elements are not only MTS and common carrier service providers, but also access service providers, whether providing access to common carrier services or enhanced services, and enhanced service providers.[10] More importantly, the Supreme Court specifically recognized that these competitive service providers need not be facilities-based. Non-facilities based service providers include non-facilities based "virtual" service providers. It has been common in the communications industry for "virtual" providers to exist on an interstate level - - these providers include commonly known groups such as switchless

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[8] 47U.S.C.§ 251(d)(2)

[9] *AT&T Corp., et. al. v. Iowa Utilities Board, et. al.*, 119 S. Ct. 721(1999).

[10] *See*, generally 47 U.S.C. §§ 256(a), 257(a)

resellers, perhaps it is not as well understood that these providers can also exist on a local exchange level, providing competition to the incumbent LECs and providing new competitive and creative services directly to consumers. The existence of "virtual" local service providers, if permitted to flourish in a service territory, could provide the basis for a BOC receiving relief under Section 271.[11]

In order to develop and flourish, however, "virtual" or reseller local service providers need access not only to the physical elements of the incumbent LEC's networks, such as the switches and lines, but also to the databases and services which are essential to the routing, completion and billing and collection for the provision of telecommunications services.

To provide an example, a service provider enters the Texas market to provide collect calling services. Collect services, by their very nature are casual access services in which a service provider generally does not have a presubscribed or permanent relationship with the terminating called party which will be billed for the service. The casual access service provider will necessarily be dependent upon Southwestern Bell, the incumbent LEC, for a series of services, databases and facilities. The service provider will require access to the lines and switches of Southwestern Bell as part of the call routing. The service provider will also require access to the line information database ("LIDB") for purposes of validating that the terminating party has granted permission for the acceptance of collect call traffic. Finally, the service provider will require either billing and collection services from Southwestern Bell or real-time billed name and address ("BNA") so it may validate and bill the call. The service provider will

[11] The BOCs should welcome "virtual" CLECs, as they may present actual competition sufficient to satisfy the competition considerations present in evaluation of the Section 271 application for entry into un-region InterLATA services.

also require access to any database maintained by Southwestern Bell regarding the credit viability of the call termination party to verify that it wants to undertake the credit risk of completing the call. Furthermore, the necessity of the two service/information alternatives - - real-time billed name and address or billing and collection - - will depend upon the size of the service provider, whether or not it is a new market entrant and its ability given its market power and service coverage to provide billing and collection to itself.

In this example, common sense dictates that access to local loops, switching, blocking and validation databases and billing and collection are all OSS and UNEs which are necessary to the service providers operation in Southwestern Bell's territory. Denial of any of these elements would not only impair the service provider from providing competitive service in that territory, it would completely prohibit it from providing the service.

III. CLEAR STATUTORY STRUCTURE

It is apparent from the explicit wording of the statute that Congress set forth the minimum or floor criteria for determining when access must be made available. The minimum or floor criteria are determined by whether the facilities, information or services are "proprietary in nature." If they are proprietary, a test for whether the element is necessary must be used; if they are not proprietary, an impairment standard must be used. Both the Eighth Circuit and the Supreme Court have recognized that this is the clear statutory structure and Congressional intent, and any deviation from this clear structure would be reversible error by the Commission.

The criteria set forth in Section 251(d)(2)(a) and (b) establish the minimum or floor criteria. The Commission must also consider other directives of Congress and elements of the Act for further direction regarding when access to facilities, information or services is required. Additional direction can be derived from the general directives set forth generally in the 1996

Act, and specifically in Sections 271, *et seq.,* which establish the obligations of the BOCs and demonstrations that must be made by the BOCs as a condition to obtaining relief pursuant to those sections. It is clear from a reading of the entire 1996 Act that Congress intended the Commission to ensure open access to network elements, provide full competition between new market entrants and incumbents, guarantee non-discriminatory access to facilities information and services, and adopt policies and directives to ensure rapid deployment of new technologies to the public. Congress also imposed stringent criteria and restrictions on the BOCs until such time as they diverge from their past monopolistic practices and begin to engage in full unfettered and non-discriminatory provision of network elements.

IV. WHAT IS PROPRIETARY?

The Act provided a clear directive to the LECs to open up their networks. Congress established two levels of consideration of whether a network element is a UNE. If the element is proprietary to the LEC a stricter standard, whether the element is necessary is imposed. If the element is not proprietary to the LEC, the standard is whether absence of the element would impair the competitor's ability to compete. The law regarding the definition of proprietary information is fairly clear.

The Telecommunications Act of 1996 (1996 Act) was amended to create "a new framework for the provision of telephone service in the United States based on the principle of unfettered competition."[12] To that end, the 1996 Act contains detailed requirements aimed at

[12] Pike & Fischer, *The Telecommunications Act of 1996: Law and Legislative History* 5 (1996)

developing competition between carriers.[13] While opening the telecommunications market to competition, Congress also intended to "balance privacy and competitive concerns."[14] Thus, access to proprietary information about a customer is somewhat restricted.[15]

In the absence of clear direction in Section 251, the treatment of consumer proprietary network information (CPNI) in Section 222 provides guidance as it appears to basically consider the same type of information. In essence, it seems logical that information not included in the definition of CPNI should not be considered proprietary as far as the restrictions set forth in Section 251(d)(2)(A).

Section 222 of the 1996 Act narrowly defines CPNI as information relating to the service provided by a carrier obtained through the provision of that service or information contained in bills pertaining to such service.[16] The FCC has held that customer name, address, and telephone number are not considered CPNI.[17] As billed name and address are not considered CPNI, the information should not face the restrictions in Section 251(d)(2)(A)-(B). As far as real time name and address, the LEC should not have the option of providing out-dated information as that practice would thwart the purpose of granting access to the information in the first place - to increase competition for the customers. Providing the information seems logically to demand that LECs provide the most current information available.

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[13] See Telecommunications Act of 1996, 47 U.S.C. §251-270.

[14] *In the Matter of Implementation of the Telecommunications Act of 1996*, 13 F.C.C.R. 8061, 8081 (1998).

[15] See Telecommunications Act of 1996, 47 U.S.C. §§ 222, 251(d)(2).

[16] See *id.*, at §222 (f)(1)(A)-(B).

[17] See *In the Matter of Implementation of the Telecommunications Act of 1996,* 13 F.C.C.R. 12390, 12391 (1998).

Other categories of information - - specifically billing and collection functions and blocking information - - have not been specifically excluded from CPNI, but do not appear to be the type of information considered restricted CPNI by the courts and the FCC. Courts have defined CPNI as including "everything from what telephone services the customer presently receives to...who the customer calls and how often."[18] Even under this broad definition, blocking features - for which the customer pays nothing and from which the customer gains no service - do not represent practical information.

The FCC has ruled that the restrictions on CPNI do not apply to everything on a customer's bill, but, rather, only those things that "pertain to the 'telephone exchange service or telephone toll service' received by the customer."[19] Blocking information does not pertain to a service provided by the carrier, it is not "a part of the carrier's business record"[20] for the customer, it is, rather, the customer's request to not have access to certain services. As a consequence, blocking information would be excluded from CPNI restrictions.

The legislative history of Section 222 the section that deals with CPNI, support this analysis. The prohibitions against the sharing of proprietary information "shall not prevent the use of CPNI to combat toll fraud or to bill and collect for services requested by the customer." See H.R. No. 104-204, at 91, reprinted in 1996 U.S.C.C.A.N. 10. 56. As a service provider's customers must have requested service if a service provider desires to send them a bill, this

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[18] *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 1999 WL 151039, at *26 (D.Or. March 17, 1999).

[19] See *In the Matter of Implementation of Telecommunications Act of 1996*, 13 FCC Rec. 12390, 12396 (1998).

[20] *Id.*

language appears to remove any restriction on CPNI necessary to that billing, including real time name and address and inclusion of the charges the LEC bill. The House Conference Report on the 1996 Act sets forth a general prohibition against sharing proprietary information. See H. Conf. Rep No. 104-458, at 117 (1996) reprinted in 1996 U.S.C.C.A.N. 124, 217. This prohibition is removed, however, if the disclosure is intended "to initiate, render, bill and collect for telecommunications services." See id. This exception to demand access to the desired information, and remove any proprietary restriction

V. THE ESSENTIAL FACILITIES DOCTRINE AND ALTERNATIVE DEFINITION OF "NECESSARY"

The ILECs, seeking to restrict access to their facilities, information and services as much as possible in order to keep competition at bay, have repeatedly put forth the essential facilities doctrine as equivalent to the necessary and/or impaired test set forth in Section 251(d)(2). The Essential Facilities Doctrine, however, is a well-known, long-standing doctrine, embodying a substantial amount of antitrust caselaw and commentary. It is a common rule of statutory construction that when a legal principle, whether set forth by Congress or the courts, is well known, and Congress chooses not to use an established legal term and instead specifies different terms, such choice of different terminology is clear and convincing evidence that Congress did not intend to adopt the better known standard and did intend to adopt a different standard. The fact that Congress does not anywhere in the Communications Act refer to the Essential Facilities Doctrine is a strong, and perhaps conclusory, demonstration that it did not intend for that test to be used. Instead, Congress intended the Commission to develop and implement two common sense lower standards consisting of necessary when access to proprietary elements is requested and impaired when access to non-proprietary elements is requested. In order to demonstrate the

inapplicability of the Essential Facilities Doctrine to UNE access requirements, we provide brief discussion of that doctrine.

The LECs have proposed that an Essential Facilities standard should apply to the provision of UNEs because that standard would provide the most protection for the LECs and their competitive position. With an Essential Facilities standard, the LECs would only have to provide the UNE if they had monopoly control over the element and the competitor could not get the element from any other source.

The application of antitrust concepts, such as the Essential Facilities Doctrine, with their punitive characteristics, is inappropriate in the regulation of the communications industry. A violation of the antitrust laws carries serious penalties, including treble damages. As a consequence, the actions of a monopolist must be rather egregious to run afoul of the antitrust laws. In contrast, telecommunications laws do not include such punitive provisions and are designed to open the industry to new competitors. The application of the Essential Facilities Doctrine would not further the legislative goal of removing barriers of entry into the market. Communications laws and antitrust laws cover different types of activities. A violation of the Telecommunications Act will not necessarily establish a violation of the antitrust laws. MCI v. AT&T, 708 F.2d 1081, 1134 (7th Cir. 1983). Transactions within the jurisdiction of the Commission should be subject to lesser standards than those applied under antitrust laws. Otter Tail Power v. U.S., 410 U.S. 366, 373 (1973). While antitrust concepts may be helpful in the communications context, they should not be determinative. Id.

The Supreme Court declined to address the ILECs' arguments on the essential facilities Doctrine in Iowa Utilities because the Court only had to decide whether the Commission had chosen an appropriate standard. The Court has been reluctant to apply the Essential Facilities

Doctrine. Instead, the Court's approach is to allow a monopolist the right to refuse to deal only if there are legitimate competitive reasons for the refusal. Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1210 (9th Cir. 1997). The Court has not adopted a single standard for evaluating cases involving a unilateral refusal to deal, and neither should the Commission. See Data General Corp. v. Grumman Systems Support, Corp., 36 F.3d 1147, 1183 (1st Cir. 1994)(discussing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)).

Even if the Commission were to adopt the Essential Facilities standard to define "necessary," Pilgrim's requested elements of billing and collection service, real time billed name and address and blocking information, qualify as essential facilities. A facility is essential if it cannot reasonably be duplicated and access to it is necessary if one wishes to compete. Fishman v. Estate of Wirtz, 807 F.2d 520, 539 (7th Cir. 1986). The facility does not have to be indispensable. Id. It is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants. Id. Billing and collection services and real-time BNA should qualify as essential facilities. AT&T's failed attempt to construct its own billing and collection facility emphasizes the infeasibility of a non-LEC duplicating the present billing and collection system. There are numerous difficulties that arise when LEC billing is not available that demonstrate the severe handicaps to market entrants of alternative means of billing and collection. The LECs are the only parties who could ever hope to have real-time BNA information because of their relationship with the consumers.

Common sense and caselaw support the proposition that the LEC's local facilities, including real-time BNA and billing and collection functions, cannot be duplicated and are essential facilities. In MCI, the court stated it was not economically feasible for the plaintiff to

duplicate the LEC's local distribution facilities. MCI v. AT&T, 708 F.2d at 1133. Another court supported the use of the Essential Facilities Doctrine with a capital-intensive public utility whose established and entrenched infrastructure could not be duplicated. Data General, 36 F.3d at 1183. When there is a public utility that has received the benefit of legislative protection for decades, isolated entrants may have problems starting their own service. Otter Tail, 410 U.S. at 378. Interconnection is frequently the only solution in such cases. Id.

There is no legitimate business justification for the LECs' refusal to provide the requested elements to Pilgrim. Pilgrim is not requesting preferential treatment, and will pay a fair price for access to the LECs' services. MCI, 708 F.2d at 1133. The LECs have the capacity to provide the requested services, and Pilgrim has the financial capacity to maintain a contractual relationship with the LECs. Id. Pilgrim is not asking the LECs to abandon their own facilities. Id.

Finally, the LECs have little to gain by employing selectivity in deciding who will appear on their bills. See Blue Cross & Blue Shield v. Marshfield Clinic, 65 F.3d 1406, 1413 (7th Cir. 1995). An LEC does not build a reputation for quality by regulating who gets into the billing envelope. A customer who has Pilgrim charges on his or her bill has requested Pilgrim services, and probably wants to be billed in the easiest possible manner for that service. The LECs provide billing for companies who engage in slamming and other fraudulent practices. Pilgrim's inclusion in the LEC bill should be a purely business decision because Pilgrim will pay for the service.

VI. Relationship to Impair

The Supreme Court ruled that the Commission did not give enough meaning to Congress' use of the word "impair" in the statute describing the provision of UNEs. The Commission

counted any increase in financial or administrative cost, or decrease in quality, to be an impairment that would require the ILEC to provide the element to the competitor. With the Commission's definition, if a competitor's profit margin fell from 100% to 99%, that would be an impairment. *Iowa Utilities Board*, slip op. at 22-23. While CLECs appreciate such a broad definition, the Court has directed the Commission to add some substance to the "impair" standard.

A common definition of "impair" is "to weaken or otherwise affect in an injurious manner." Cases arising in other settings can also provide some guidance on a definition of "impair." An economic burden may impair the effectiveness of an organization. *South Carolina Educ. Ass'n. v. Campbell,* 883 F.2d 1251, 1256 (4th Cir. 1989). This case confirms that economic harm can be enough to satisfy the "impair" standard. The Commission, after the Court's admonitions, should establish an economic impairment standard with some substance that will withstand subsequent judicial scrutiny. Something greater than economic harm of one percent of earnings would seem to be required.

The Commission has suggested modifying the "impair" standard with the word "material." "Material" has been defined in other legal contexts. In International Trade Commission statutes, "material injury" is defined as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A)(*quoted in Maine Potato Council v. U.S.*, 613 F.Supp. 1237, 1240 (CIT 1985). In *Maine Potato Council*, a decline of 7.0% in the hours worked by potato handlers was evidence of material injury to the industry. *Id.* In patent, insurance, and securities law, a material misrepresentation is one that causes the decision maker

to act in a different manner than he would without the misrepresentation. In other words, if something causes a change in conduct, that thing is material.

For the purposes of this rulemaking, a competitor's ability to provide communications services is materially impaired if the denial of access to a UNE causes: (1) an increase in costs or decrease in quality that is not inconsequential or unimportant; or (2) a change in the way the competitor provides its services or conducts its business. By applying the word "material" to the "impair" standard, the Commission will introduce meaningful limits to UNE access, like Congress intended.

VII. OTHER FACTORS TO BE CONSIDERED IN ADDITION TO NECESSARY AND IMPAIR

A. General Directive of Act

The requirements of Section 251(d)(2) cannot be evaluated in isolation - - they must be evaluated in the context of Congressional intent and direction reflected throughout the 1996 Amendments. Even a brief review of inter-related applicable amendments demonstrates an overwhelming Congressional directive to enhance competition, accelerate the deployment of new technologies and services to the public and require the ILECs to provide unrestricted and non-discriminatory access to not only all the necessary network elements on an unbundled basis, but to all elements which it provides its own affiliates.

It has long been the policy of Congress for the Commission to "encourage the provision of new technologies and services to the public." *See,* 47 U.S.C. § 157(a) Many of the new services offered by competitive providers require access to a variety of incumbent facilities, information and services, and need not rely on any facilities of their own to be provided. In addition to the necessary and impair standards set forth in Section 251(d)(2), the Commission

should additionally require the provision of facilities, information and services that promote the policy set forth in Section 157.

Section 256 of the Act, 47 U.S.C. § 256, provides further direction that Congress intends for users and vendors of communications products and services to have non-discriminatory access to public telecommunications networks. This access must ensure the ability of users and information providers to seamlessly and transparently transmit and receive information across these networks. Pilgrim believes that the requirements in Section 256(a) provide substantial guidance as to the meaning of necessary and impair. Any facility, information or service is necessary if, without its provision, the interconnection and provision of service by any service provider, including an information service provider, would not be seamless or transparent.

Section 257 of the Act requires the Commission to eliminate "market entry barriers for entrepreneurial owners and other small businesses in the provision and ownership of telecommunications and information services, or in the provision of parts or services to providers of telecommunication services and information services." 47 U.S.C. § 257(a) The Commission has previously interpreted market entry barriers to include actions, or information or service denial, which are "primarily to encompass those impediments to entry within the Commission's jurisdiction that justify regulatory intervention because they so significantly distort the operation of the market and harm consumer welfare." *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, GN Docket No. 96-113, Report, 12 FCC Rec. 16802, 16812 (1997). Pursuant to Section 257 and the Commission's previous interpretation, it would be consistent to read the requirements of Section 251(d)(2) to find that any facility, information or service, the denial of which would present a barrier to market entry, would the necessary or impair standard, is appropriate. The application of the necessary or impair standard

would primarily be driven by a showing by a new market entrant or third party provider that the denial of access to that particular element was a barrier to market entrant, and would require no showing by the LEC.

With respect to subsets of services, Congress has determined that in various instances in which LECs provide certain services, they may not discriminate in favor of their own services in their provision of telecommunication services or elements thereof. Specifically, Section 260, regarding telemessaging services, and Section 274, regarding electronic publishing, provide for non-discriminatory access and private rights of action for enforcement of those rights. Section 260(d) could be instructive as to the necessary level of financial harm that could be implicated by the impair standard by reinforcing the concept of "material" financial harm. Any denial of facilities, information or services which had a "material" negative financial impact on a service provider would impair that provider's ability to offer a service to the public.

B. Section 271 Criteria

The Commission correctly recognized that the competitive checklist in Section 271(c)(2)(B) is relevant to the necessary and impair criteria of Section 251(d)(2), particularly given the cross-referencing which is evident in Section 271. At a minimum, necessary and impair standards enumerate each of the items from Section 271. The Commission should take the opportunity in the rule making proceeding to expand its list of UNEs based upon the requirements of Section 271(c)(2)(B) and its prior pronouncements in related cases over the last two years. Pilgrim notes that Section 271(c)(2)(B)(x) requires non-discriminatory access to databases and associated signaling necessary for call routing and completion. In the context of this proceeding, the Commission should evaluate specific databases and signaling necessary for call routing completion, and include them in the checklist of UNEs in order to further the

purposes of the Act. Among the databases and signaling that should be required are all databases which relate to customer preference for acceptance of a service. Examples of these include collect call blocking and third party bill blocking, which are contained in LIDB, and blocking for international and 900-number services, which currently are steadfastly refused by the LECs.

Information necessary to validate whether a customer maintains a valid account and is an acceptable credit risk for the extension of public utility credit, as well as the actual billing and collection for the provision of services are also necessary elements of call routing and completion, as no carrier will route or complete a call to a customer who either refuses of fails to pay for the service. As a consequence, the provision of real time BNA, which has also been steadfastly refused by the LECs, as well as billing and collections, are UNEs which meet the necessary and impair standards.

The Commission has recognized that billing and collection, and real time billed name and address are necessary to authenticate and complete calls. BNA and billing and collection required network elements and OSS which must be supplied by ILECs on a non-discriminatory basis. In *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, *First Report and Order*, 11 FCC Rec. 15499, 19448 (1996), the Commission found that operator services, which are specifically enumerated under Section 271(c)(2)(B)(vii), equate to the provision of billing and collection. The Commission also recognized that billing is a necessary part of call completion in *Application of Bell South Corporation, Bell South Telecommunications, Inc. and Bell South Long Distance, Inc. for Provision of In-region, InterLATA Service in Louisiana,* CC Docket No. 98-121, *Memorandum Opinion and Order,* 13 FCC Rec. 20599, 20740 (1998). The Commission also found that billing is one of the primarily OSS functions. *Id.* at 20723.

Therefore, the Commission should adopt necessary and impair criteria which encompass any element which, in the provision of telecommunication service, a prudent service provider would require during or prior to the routing and completion of a call or provision of a service.

VIII. APPLICATION OF TEST DEPENDS UPON RELEVANT COMPETITIVE MARKET

In applying either the necessary or impair standard, the Commission should also gauge whether an element is necessary or would impair the provider's ability to offer a service based upon the relevant market in which the service provider is attempting to offer service, and the characteristics of the provider requesting access to the network elements.

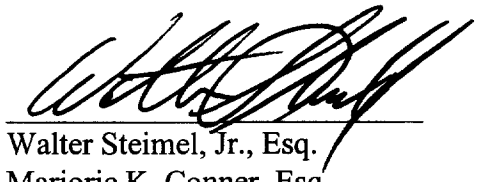
Certain markets will not necessarily require a higher level of element accessibility. For instance a service provider providing only presubscribed 1+ service as a facilities based competition LEC would have little or no need for blocking, billing name and address information or actual billing and collection service as it would have the primary and direct relationship with its own local exchange customer. On the other hand, a service provider which was providing a virtual competition LEC or casual access communications service such as collect calling would have an absolute need for all the above referenced services that information resides solely within the incumbent LEC. An information service provider that was providing access pursuant to presubscription agreements under 47 U.S.C. § 228(c)(8) may not require access to real time blocking information, as any blocking information request would be included in the presubscription agreement. On the other hand, an information service provider providing access pursuant to 47 U.S.C. § 228(c)(9), accepting calling cards, would not only need access to blocking information but would also need billing and collection services from the LEC.

IX. CONCLUSION

In this proceeding, at the direction of the Supreme Court, the Commission will develop additional guidelines for the unbundling of network elements. Congress intended for the 1996 Act to open competition in the telecommunications industry by requiring incumbent local exchange carriers to provide pieces of their network to competitors and new market entrants. According to the Court, the Commission failed to give sufficient substance to the "necessary" and "impair" standards in Section 251 of the Act. In revisiting this topic, the Commission has the opportunity to increase the list of unbundled network elements. Pilgrim maintains that real-time billed name and address, billing and collection services, and blocking data should be added to the list of unbundled network elements.

To qualify as an unbundled network element, Section 251 requires that a network element that is proprietary to the LEC be "necessary." For a non-proprietary element to qualify as an unbundled network element, the failure to provide that element must "impair" the ability of the carrier to provide its service. The Commission should adopt a definition of "necessary" for Section 251 similar to the use of "necessary" in Section 271, and far less restrictive than the essential facility definition proposed by the LECS. Even within the essential facility definition, the elements Pilgrim requests in this comment are necessary. Pilgrim has shown that the elements it seeks non-proprietary. A lack of access to those elements will materially impair its ability to provide its communications services. Access to these elements is further supported under the general dictates of the Act as well as the Section 271 checklist. The network elements Pilgrim suggests adding to the list qualify under the multiple criteria for unbundled network elements

Respectfully submitted,



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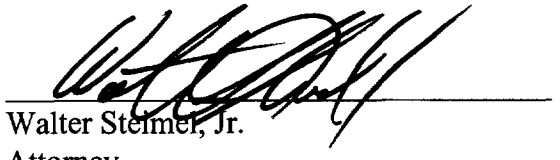
CERTIFICATE OF SERVICE

I, Walt Steimel, Jr., an attorney with the law firm of Hunton & Williams, hereby certify that on May 26 1999, the foregoing COMMENTS OF PILGRIM TELEPHONE was served upon the Federal Communications Commission by hand delivery.



Walter Steimel, Jr.
Attorney